Supreme Court, U.S.
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No. 95-563

In the

Supreme Court of the United States

October Term 1995

CONSTRUCTION AND LABORER'S UNION LOCAL NO. 324, JESSE THOMAS, JESSE DURRAN, JR., JESSE DURRAN, SR., and CHARLES EVANS,

Petitioners,

v.

DOUGLAS MURRAY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth circuit

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MEMORANDUM IN OPPOSITION

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January 19, 1996

QUESTIONS PRESENTED

1. Did the court of appeals properly uphold the trial court's exercise of discretion to excuse a juror based on the particular circumstances of that juror and those of other jurors?

2. Did the court of appeals properly affirm a verdict for $77,500 in punitive damages, awarded for a series of retaliatory actions against a union dissident in violation of the Landrum-Griffin Act, where the plaintiff received only nominal compensatory damages of $100, on the ground that compensatory damages for free speech injuries are hard to measure?

3. Should the court of appeals have decided whether, in the circumstances of this case, damages could be awarded under the LMRDA for retaliatory denial of a referral for work at the union hiring hall, instead of affirming on the alternate ground that several other forms of retaliation had also been proved?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 2

REASON FOR DENYING THE WRIT 9

Petitioners' Questions, to the Extent That They Were Preserved in the Court Below and Are Presented in This Case, Do Not Present Issues of Law on Which the Lower Courts Are Divided. . . 9

1. The Removal of Juror Giancoli 9

2. The Refusal to Tell Respondent About the Referral Letter 13

3. The Punitive Damages Issue 15

CONCLUSION 18

TABLE OF AUTHORITIES

CASES Page

BMW of North America v. Gore,
No. 94-896 (S. Ct) 16

Delta Air Lines v. August,
450 U.S. 346 (1981) 10

Doty v. Sewall,
908 F.2d 1053 (1st Cir. 1990) 17

Gertz v. Welch,
418 U.S. 323 (1974) 16

Green v. Zant,
715 F.2d 551 (11th Cir. 1983) 11

Guidry v. Operating Engineers,
882 F.2d 929 (5th Cir. 1989),
vacated 494 U.S. 1022 (1990),
on remand, 907 F.2d 1491 (5th Cir.1990) 17

IBEW v. Foust,
442 U.S. 42 (1979) 7, 17

McCraw v. Plumbers,
341 F.2d 705 (6th Cir. 1965) 18

Morgan v. Woessner,
997 F.2d 1244 (9th Cir. 1993) 8

NLRB v. Iron Workers Local 75,
583 F.2d 1094 (1978) 6, 14, 15

Page

Pacific Mut. Life Ins. Co. v. Haslip,
499 U.S. 1 (1991) 8

Petramale v. Laborers Local 17,
847 F.2d 1009 (2d Cir. 1988) 17

Quinn v. DiGiulian,
739 F.2d 637 (D.C. Cir. 1984) 17

Radio Station WOW v. Johnson,
326 U.S. 120, 128 (1945) 10

Reed v. UTU,
488 U.S. 319 (1989) 15, 18

Shimman v. Frank,
625 F.2d 80 (6th Cir. 1980) 18

Smith v. Wade,
461 U.S. 30 (1983) 18

United States v. Brown,
823 F.2d 591 (D.C. Cir. 1987) 11

United States v. Essex,
734 F.2d 832 (D.C. Cir. 1984) 11

United States v. Hernandez,
862 F.2d 17 (2d Cir. 1988) 11

United States v. Tabacca,
924 F.2d 906 (9th Cir. 1991) 11

United States v. Wilson,
894 F.2d 1245 (11th Cir. 1990) 11

Page

Vandeventer v. Operating Engineers Local 513,
579 F.2d 1373 (8th Cir. 1978) 17

STATUTES AND RULES

42 U.S.C. § 1983 18

Federal Rules of Civil Procedure,
Rule 50(a) 2

Labor-Management Reporting and Disclosure Act of 1959,
29 U.S.C. § § 401 *et seq.* . . . . . *passim*

National Labor Relations Act,
29 U.S.C. §§ 151 *et seq.* . . . . . 6, ,14, 15

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MEMORANDUM IN OPPOSITION

Petitioners ask the Court to grant certiorari to consider several questions relating to the excusing of a juror, appellate review of punitive damages awards, and the application of the Landrum-Griffin Act to forbid denial of work at a union hiring hall in retaliation for exercise of intra-union free speech. However, two of these questions are either not presented here or were not advanced below; nor is there any significant division of opinion among the lower courts on any of the questions. Instead, petitioners ask the Court to correct what they see as lower court errors in the application of well-established standards. Accordingly, the petition should be denied.

STATEMENT

This case arises out of a long-running dispute between respondent Douglas Murray, a member of petitioner Laborer's Local 324, and the individual petitioners, who are all officers or, in the case of petitioner Durran Sr., the father of an officer of the Local. Respondent is a long-time union activist who opposes the incumbents. He publishes a newsletter, *Pick and Shovel*, which has been highly critical of the petitioners, and he has run for office in opposition to the individual petitioners. In this case, respondent contended, and in large part the jury agreed, that petitioners had retaliated against him for this dissident activity, punishing him physically, economically, and otherwise. Thus, petitioners threatened him with physical injury; ordered him to stop speaking at union meetings and ejected him from union meetings; tore the *Pick and Shovel* down from bulletin boards where respondent had posted it; tried to have respondent arrested for distributing literature at the union hiring hall; deprived respondent of hiring hall referrals; and impounded his union dues to cover costs of an arbitration.

With the exception of a few claims on which District Judge Walker granted judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure, respondent's claims went to trial before an eight-member jury. At the outset of the trial, Judge Walker advised the jury that the evidence would be finished by Thursday, February 18, so that it could begin deliberations by Friday. However, the trial took longer, and deliberations did not begin until Monday afternoon, February 23. The next day, the jury had to stop deliberating at 11 a.m. so that one of the

jurors could keep a previously scheduled engagement; the jury indicated that one of the jurors wanted to refrain from deliberating at all on Wednesday so that he could attend to various business matters that had accumulated. That juror, Giancoli, said that he could postpone some of these matters, but that he would have to leave late the next morning for a meeting that he could not postpone. Judge Walker expressed concern about the delays that would be entailed, but said that he preferred to let jurors work the schedule out among themselves. The jury indicated that they would prefer to recess so that Giancoli could return after his meetings.

The following day, after deliberations began, the jury sent out three notes, indicating that the jury was divided both on the resolution of the case and even on the schedule for jury deliberations. They included a schedule showing Giancoli's need to leave at 11:15 AM, two other jurors' need to leave during that afternoon, and still a fourth juror's desire to leave on Thursday and Friday for previously scheduled engagements. Because the jury was no longer agreed on the issue of scheduling, the court felt obligated to make the scheduling decisions itself. In that regard, the court expressed concern about the effects of repeated interruption of the jury's deliberations, while emphasizing that it was uncertain how the jury was divided.

At that point, petitioners' counsel, Ms. Benson, questioned whether it was wise to discharge Giancoli. Because Giancoli had said that the jury was "hopelessly divided," although seven jurors had said that they preferred to keep deliberating, Ms. Benson argued that it was possible the division was seven to one. Based on this assumption, she expressed concern lest, after the fact, the loser would claim that Giancoli's discharge constituted a denial of the right to

a unanimous jury. The judge replied that the division might or might not be seven to one, and Ms. Benson agreed, "You're absolutely correct. This is purely speculation."

Accordingly, the court discharged Giancoli. Later in the day the jury returned special verdicts finding various respondents liable for $100 in compensatory damages, and for a total of $77,500 in punitive damages, for violations of respondent's free speech rights under the LMRDA. Petitioners then obtained a declaration from Giancoli in which he said that he had become the lone holdout, that other jurors had urged him to leave the jury so that they could reach a unanimous verdict, and that he believed that the other jurors had purposefully voted to keep deliberating so that he would be removed from the jury. Based on this declaration, petitioners moved for a new trial, but this motion was denied.

Petitioners also objected to the punitive damages award, solely on the ground that it was disproportionate to the amount of compensatory damages. In argument on this motion, of which a transcript has been lodged with the Clerk, Judge Walker made clear that he took this argument seriously, but he ruled that, even if the difference between the two awards was great, the amount of punitive damages was not very great, and would not harm the union financially (there was evidence that both the union's annual income and its assets exceeded $1,000,000). Moreover, he noted that actual damages for violations of free speech rights are not easily quantified, and that the jury verdict represented their effort to ensure that the larger societal values represented by the LMRDA were vindicated.

Both sides appealed to the Court of Appeals for the Ninth Circuit. Petitioners argued first that the discharge of

juror Giancoli had violated their right to a unanimous jury verdict. However, unlike their petition, in the court below petitioners did not attribute bad motives to Judge Walker, or accuse him of discharging Giancoli for the purpose of removing an obstacle to a unanimous verdict. Instead, they relied on their after-the-fact affidavit from Giancoli to show that they were prejudiced by Giancoli's removal. App. Br. 22-24 (copies of the appellate briefs have been lodged with the Clerk). They then argued that, because the facts showed a possibility that Giancoli was a lone holdout juror, Ninth Circuit precedent required the court to inquire into the facts to determine whether the rest of the jury was trying to get rid of Giancoli. *Id.* 21, 24-28. They argued finally that Judge Walker's decision to remove Giancoli, although he allowed the jurors to suspend deliberations by mutual agreement the day before, was discriminatory, *id.* 28-29, and that under Ninth Circuit precedent, Giancoli's need to attend a business meeting during deliberations did not constitute "just cause" for his removal. Respondent, for his part, argued that the district judge had done the best he could with a very difficult situation, and that his discretionary decision not to allow further delays in deliberations so that various jurors could go off to attend to their private business, and removing Giancoli when he was unable to postpone his meeting, should be respected. In their reply brief, petitioners attacked the reasons given by respondent to support the district judge's exercise of discretion, Reply Br. 1-8, but they continued to argue only that, from the vantage point before Giancoli gave his affidavit, there was a "strong possibility" that he was a lone holdout. Petitioners still did not argue that he was a "known" holdout, nor accuse Judge Walker of deliberately discharging Giancoli because he was a minority of one.

Most of the rest of petitioners' appellate brief was devoted to arguing various aspects of the merits of their attacks on the verdicts based on the Landrum-Griffin Act and the common law of assault. With respect to the union's failure to call respondent to tell him that his referral had been requested by name by an employer, petitioners urged the Ninth Circuit not to follow the Fifth Circuit in holding that retaliatory denial of hiring hall referrals could infringe free speech in violation of the LMRDA, and that, in any event, the union's refusal to call respondent with this referral was required by the hiring hall agreement. Relying on a Ninth Circuit case, *NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (1978), petitioners argued that, if in fact the hiring hall agreement allowed the refusal to convey the request, then their motives for denying the referral were irrelevant. Respondent, however, pointed out that the lower courts unanimously hold that hiring hall retaliation against union dissidents is actionable under the free speech provisions of the LMRDA. Moreover, respondent showed that, even if bad motivation was not actionable under the NLRA, it was actionable under the LMRDA, and that *Iron Workers* was distinguishable because the union there had followed an express, written rule, while here, not only was there was no written rule forbidding the union from calling members to tell them of name requests, but the evidence showed that other members had received such calls.

The question of punitive damages received very abbreviated treatment from petitioners in the court below, only three pages in their 50 page opening brief and a page and a half in a 26 page reply brief. Petitioners advanced two arguments. First, they argued that the punitive damages were necessarily excessive solely on the ground that such

damages were many times the amount of compensatory damages. Second, they argued that this Court's decision in *IBEW v. Foust*, 442 U.S. 52 (1979), refusing to allow awards of punitive damages for breach of the duty of fair representation, barred such damages under the LMRDA as well.

The court of appeals unanimously affirmed in every respect. 55 F.3d 1445. The court readily agreed with petitioners that a juror's refusal to join a verdict to which all other jurors agree is not cause for discharge. However, "this type of case readily invites an appellate court to second-guess a trial court. This is a temptation we must resist . . .." *Id.* at 1451. The court distinguished a Second Circuit case where the trial judge had apparently removed a juror, two days after receiving complaints from other jurors that he was disruptive and irrational, on the ground that the juror "would not 'change his mind'"; these facts suggested that the removal was based on his disagreement with his fellow jurors. Here, by contrast, the notes from the jury were ambiguous, and nothing in the judge's remarks suggested that he removed Giancoli because the latter was perceived as the obstacle to a unanimous verdict. A Ninth Circuit case was distinguished on the ground that there, a juror had been discharged at the first sign of scheduling conflicts among the jurors, unlike this case where the judge tried to accommodate scheduling problems until they appeared to endanger the jury's orderly deliberations. *Id.* at 1452.

Turning to the merits of the case, the court of appeals found it unnecessary to address petitioners' argument that their failure to contact respondent about the employer's referral letter could not be a violation of the LMRDA. Indeed, the court acknowledged that this might be a valid

argument. *Id.* 1542. However, the court found substantial evidence with respect to other free speech violations to support the jury's verdicts, including an attempt to confiscate respondent's newsletters, the suppression of his dissenting views at a union meeting, and the use of his union dues for arbitration costs. In combination, the court held, these facts "suffice to establish a general scheme to suppress dissent within the union. [citations omitted]. Clearly, the jury believed Murray's version of events." *Id.* at 1452-1453.

On the question of punitive damages, the court of appeals applied the three-part test it enunciated in *Morgan v. Woessner*, 997 F.2d 1244 (9th Cir. 1993), to comply with this Court's ruling in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). First, it ascertained that the district judge properly instructed the jury on the purpose of punitive damages. Second, it noted that the trial judge had properly explained why he upheld the jury's verdict, giving consideration to the amount of punitive damages by comparison to the facts of the case, including consideration of similar cases. The court specifically noted, and approved, Judge Walker's refusal to overturn the verdict solely because punitive damages were so much higher than compensatory damages, in light of the fact that free speech rights are intangible, whose infringement was "the sort of thing that you can't really put a price tag on." *Id.* at 1453. Finally, the court conducted its own review for excessiveness to determine whether it exceeded the amount needed to accomplish the goals of punishment and deterrence, but found that the awards were not grossly excessive "given the seriousness of the infringement on Murray's free speech rights." *Id.*

REASONS FOR DENYING THE WRIT

PETITIONERS' QUESTIONS, TO THE EXTENT THAT THEY WERE PRESERVED IN THE COURT BELOW AND ARE PRESENTED IN THIS CASE, DO NOT PRESENT ISSUES OF LAW ON WHICH THE LOWER COURTS ARE DIVIDED.

In large measure, the questions raised by petitioners either were not presented below or are not presented in this case, and in any event, those questions have not divided the lower courts. Rather, petitioners squeezed into their thirty-page petition a grab-bag of objections to the manner in which the court below resolved their objections to the jury's verdict. In a number of respects, however, the arguments presented to this Court differ greatly from the contentions that they presented (and thus preserved) in the court of appeals. One of their arguments (their second question presented) although made below, is not presented here because the court of appeals found it unnecessary to reach it, and expressed no opinion on it. Moreover, in large part, the issues that they seek to present to this Court are not ones on which there is division among the courts of appeals. We think the court below was correct in each respect, but in any event the mere correction of alleged lower court error is not a basis for this Court to grant certiorari here.

1. The Removal of Juror Giancoli.

Petitioners' first question is whether the district court's removal of (1) "a known solitary hold-out juror," (2) "late in the deliberations of an apparently hung jury," in order (3) "to avoid a half-day delay in deliberations," violated their right to a unanimous jury. Pet. at i. Their petition not only repeatedly asserts that the district judge knew that Giancoli was a holdout on a hung jury, but accuses the judge of

deliberately removing Giancoli for that reason. However, as we explain below, not only is the accusation of improper motive not correct, but it was not even argued below. Moreover, none of the three above-numbered factual predicates of this question accurately characterize the record in this case. The first question is thus not a reason to grant review.

If the motive of removing a holdout juror had been the reason for Giancoli's removal, the court of appeals's opinion makes clear that it would have been quick to reverse. However, that court did not believe that Judge Walker had either the knowledge or the motive that petitioners now attribute to him, and petitioners did not make these accusations before the court of appeals. In the court below, petitioners argued only that there were some indications from which the trial judge **might** have inferred these facts, that the evidence was sufficient to require the district judge to inquire further, and that the removal of Giancoli in these circumstances was discriminatory. Because petitioners did not make the "improper reason for removal" argument below before seeking rehearing, they have not preserved it. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981); *see Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945). And because the court of appeals not only did not believe that Judge Walker had the bad motive now attributed to him, but also found the pre-discharge evidence of Giancoli's status as a sole holdout to be ambiguous at best, its opinion cannot stand for the proposition that petitioners must make of it in order to establish a conflict among the circuits. Thus, in addition to not being preserved, petitioners' first question is not genuinely presented in this case.

In any event, there is general consensus among the lower courts about the standards by which claims of denial of a unanimous verdict through the removal of jurors are to be judged (in criminal cases, at least), and the cases cited by petitioners reflect that consensus. A juror cannot be excused without a good reason, and the reason must be stated on the record. *United States v. Tabacca*, 924 F.2d 906, 914-915 (9th Cir. 1991); *United States v. Essex*, 734 F.2d 832 (D.C. Cir. 1984). Although the decision about whether to discharge a juror will be upheld absent an abuse of discretion, so long as there is a finding of just cause on the record, *United States v. Wilson*, 894 F.2d 1245, 1250 (11th Cir. 1990), the fact that the juror is a holdout against a unanimous verdict is not an acceptable reason, and if there is substantial uncertainty whether that is why the juror was discharged, the resulting verdict must be overturned. *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988); *United States v. Brown*, 823 F.2d 591 (D.C. Cir. 1987); *Green v. Zant*, 715 F.2d 551 (11th Cir. 1983).

Petitioners rely on the foregoing cases to support the proposition that "even a hint that a juror is a holdout against an otherwise unanimous verdict precludes her dismissal." Petition at 11-12. But the courts have not gone quite so far; the most they have said is that, unless the court can be certain that the **reason** for the removal was not status as a unanimous holdout, reversal is required. *E.g.*, *United States v. Hernandez*, 862 F.2d 17 (2d Cir. 1988). Here, the court below ruled that "neither his remarks nor his actions indicate in any way that he chose to remove juror Giancoli" for an improper reason, 55 F.3d at 1451, and even petitioners did not claim that the district judge had such an improper reason

until the court below had issued its opinion affirming the judgment.

In order to reach the legal question that their petition seeks to present, petitioners are compelled to take issue with the lower court's assertion that there is no indication of bad motive. But the key factual predicate for a claim of improper motive — that Giancoli was a "known sole holdout juror" — was conceded away by petitioners' own counsel in her argument to the district court before Giancoli was discharged. At that time, she raised the possibility that the jury might be in a seven-to-one position, but she readily agreed, when the judge said, "maybe so, and maybe not," that her thoughts on this point were "purely speculative." Only after petitioners' counsel had had the opportunity to interview juror Giancoli and obtain an affidavit from him did she develop the post hoc theory by which petitioners now question the district court's judgment. But motive cannot be attributed based on evidence that was presented only after the district court acted.

The other two factual predicates for petitioners' argument are also missing. At the time juror Giancoli was discharged, it was not "late in the deliberations," and it was not at all clear that the jury was hung. The jury had deliberated for less than ten hours — from 12:30 Monday through the afternoon, until only 11 AM on Tuesday, and then from 8 AM to 10 AM in Wednesday. At first the entire jury had indicated that a unanimous verdict was impossible, but later most of the jurors indicated that they thought they were close to a verdict, while one juror, who had suggested that there be no deliberations at all on Wednesday, and had to leave by 11:15 to make his business meeting, sent out a note saying that the jury was "hopelessly divided." Neither

the district court nor the court of appeals found a clear message that the jury was hung from these "mixed signals," 55 F.3d at 1450, and it is only with the benefit of hindsight (and Giancoli's affidavit) that petitioners are able to argue that matters were clear. Moreover, although Giancoli needed to be absent only on Wednesday, the schedule provided by the jurors showed that another juror, Caroe, had her own affairs to attend to on Thursday and Friday; the district court could not accommodate one without accommodating the other. In these circumstances, the trial judge was entitled to decide not to allow the continual postponement of deliberations; the court of appeals was right to uphold his exercise of discretion; and, in any event, petitioners' arguments are not worthy of review by this Court.

2. The Refusal to Tell Respondent About the Referral Letter.

Petitioner's third question is also not properly presented here. There is no doubt that petitioners made below the legal argument on which they seek review here, but the court of appeals found it unnecessary to consider that issue. Petitioners' refusal to tell respondent that an employer had asked for him by name was, after all, only one of a series of incidents in which respondent claimed that petitioners had retaliated against him for speaking out against what he considered to be the individual petitioners' mismanagement of the union, and even if the referral letter incident was legally nonactionable, the other incidents were both actionable and supported by substantial evidence. Thus, the court of appeals responded to petitioners' referral letter argument by saying that "possibly" it was correct, but that it did not warrant reversal in any event. Although petitioners take issue with these alternate grounds for affirmance in a

footnote in their petition, at 28-29 n.13, they do not suggest that these rulings should be reviewed on certiorari. In any event, because the court of appeals did not even address petitioners' argument, not to speak of rejecting it, there is no reason to grant certiorari to consider it now.

Nor, for that matter, is there disagreement among the courts of appeals on the second of petitioners' questions presented. The only lower court decision that petitioners contend is contrary to the jury's verdict is a previous decision of the Ninth Circuit itself, where the court of appeals ruled that, when a union complied with written provisions of its hiring hall agreement, the National Labor Relations Board could not inquire into the reasons for such compliance in order to find a breach of the duty of fair representation. *NLRB v. Iron Workers Local 75*, 583 F.2d 1094 (1978). A supposed intra-circuit conflict, although possibly a good reason for rehearing en banc, would not justify a grant of certiorari.

In any event, respondent's claim is not foreclosed by *Iron Workers*. In that case, a specific written provision limited the right to receive requests by name to workers with at least four years' experience. The court of appeals noted that the NLRA required compliance with written rules, and held that, if the union complied with those rules in not accepting a request by name for a less experienced worker, it was irrelevant under the NLRA why it did so. Here, by contrast, not only was there no written rule in the hiring hall agreement forbidding communication with recipients of referral requests, but the union training center, where

respondent was at the time of the request, had a policy of taking messages for workers in attendance there.[1]

Finally, the evidence was that, whether or not the union was forbidden to convey such messages, it sometimes did convey them. Respondent argued — and the jury apparently agreed — that an inference should be drawn that the union deliberately refrained from conveying the message to respondent because of its animus against him. Because the issue in a free speech retaliation case is one of good or bad motive, this was a proper subject for consideration even if it could not be considered under the NLRA. This Court has observed that the LMRDA was enacted precisely because Congress believed that the NLRA did not afford union dissidents adequate protection against union abuses. *Reed v. UTU*, 488 U.S. 319, 332 (1989). Thus, even if motive may not be considered under the NLRA (assuming that *Iron Workers* is good law), free speech cases under the LMRDA present very different considerations.

3. The Punitive Damages Issue.

Petitioners' second question presented combines two separate issues. First, they accuse the court of appeals of being too cursory in its review of the punitive damages portion of the verdict, which they argue warrants reversal solely because it was much greater, proportionally, than the compensatory damages awarded. Second, they argue that

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[1] To be sure, an arbitrator considering respondent's grievance under the hiring hall agreement over the union's failure to provide the message refused to find that the union violated its agreement by failing to convey the message to respondent. He went on to say that the union could not convey such messages, but, as respondent argued below, this holding was dictum and hence not binding on respondent.

punitive damages cannot be awarded against unions under the LMRDA. Neither portion of the question warrants review.

First, the court of appeals gave petitioners' punitive damage award as much attention as it deserved. Petitioners did not argue in the court of appeals for a general review of the excessiveness of the punitive damages; their only argument on punitive damages, apart from the contention that they are generally improper against unions, was based on the fact that the punitives were almost 800 times the compensatories. The court of appeals' response to this contention, echoing the district judge, that an award of $77,500 should not be reduced just because free speech violations are inherently difficult to quantify, was well taken.

In this regard, the case is wholly unlike *BMW of North America v. Gore*, No. 94-896, on which petitioners' supplemental memorandum in support of certiorari relies. In that case, the $5,000,000 punitive damage award was far in excess of the compensatory damages for harm to property, a wholly tangible injury for which monetary damages are easily measured. By contrast, it is well-established that the receipt of nominal damages is not a bar to the award of punitive damages. Indeed, under *Gertz v. Welch*, 418 U.S. 323, 349-350 (1974), a libel plaintiff who satisfies the standard of "actual malice" may obtain quite substantial punitive damages even if he sustains **no** actual damages. Accordingly, petitioners' earlier concession that respondent's $100 damage award amounts to nominal damages, Pet. at 22 n.12, undermines their contention that this case should be held for disposition in light of *BMW*.

Even though the union argued only based on the ratio between compensatory and punitive damages, the court of appeals addressed each of the three factors in its test for

punitive damages. Having failed to address all of these factors in their briefs below, petitioners now take the court of appeals to task for its supposed failure to provide more specifics on each of the other factors. But a case where petitioners made only a cursory objection to punitive damages is not a likely vehicle for deciding just how detailed the appellate court's opinion must be.

Petitioners' last contention is that awarding punitive damages against unions is contrary to national labor policy, for which they cite *IBEW v. Foust*, 442 U.S. 42 (1979). *Foust* holds that punitive damages may not be awarded in duty of fair representation ("DFR") cases. The *Foust* majority expressly reserved the issue of whether such damages may be awarded under the LMRDA. *Id.* at 47 n.9. Justice Blackmun's concurring opinion approved of this reservation, while expressing the *fear* that the opinion might imply that punitive damages were unavailable in LMRDA cases. No Justice advocated a prohibition on punitive damages in such cases.

Petitioners do not suggest that there is any division among the lower courts about whether punitive damages may be awarded under the LMRDA, and with good reason — the circuits, both before and since *Foust*, are unanimous in permitting punitive damages in LMRDA cases. *E.g.*, *Doty v. Sewall*, 908 F.2d 1053, 1062 (1st Cir. 1990); *Guidry v. Operating Engineers*, 882 F.2d 929 (5th Cir. 1989), *vacated on other grounds*, 494 U.S. 1022 (1990), *on remand*, 907 F.2d 1491 (5th Cir. 1990); *Quinn v. DiGiulian*, 739 F.2d 637, 651 (D.C. Cir. 1984); *Vandeventer v. Operating Engineers Local 513*, 579 F.2d 1373, 1380 (8th Cir. 1978); *see also Petramale v. Laborers Local 17*, 847 F.2d 1009, 1013 (2d Cir. 1988). Moreover, punitive damages may be

awarded for civil rights violations under 42 U.S.C. § 1983, *Smith v. Wade*, 461 U.S. 30 (1983), and the LMRDA is more closely analogous to section 1983 than to the DFR. *Reed v. UTU*, 488 U.S. 319, 327-334 (1989). Accordingly, the availability of punitive damages is not a substantial question warranting this Court's review.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[2] *McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965), is sometimes cited as taking the opposing view. That case involved a union member's claim for lost wages incurred before his suspension from membership, which the court denied on the ground that only damages that are "directly and proximately caused" by an LMRDA violation may be awarded. Although it is not clear that McCraw was seeking punitive damages, the same court later indicated that *McCraw* implied that punitive damages would be unavailable, while simultaneously questioning the "present viability" of that aspect of *McCraw*. *Shimman v. Frank*, 625 F.2d 80, 101 (6th Cir. 1980).